Supreme Court, U.S.
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92-1094

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

JOHNNIE BLAKE,
Petitioner,
v.
JACK KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Respondent.

Petition For Writ Of Certiorari To
The United States Court Of Appeals
For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

DID THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FEDERAL CIRCUIT ERR IN DETERMINING THAT NO APPEAL LIES FROM A DECISION OF THE UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT BOARD OF CONTRACT APPEALS IN THE UNITED STATES CIRCUIT COURT OF APPEALS AND THAT IT ALSO DOES NOT LIE IN A UNITED STATES DISTRICT COURT?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iv
OPINIONS	2
JURISDICTION	2
STATEMENT OF THE CASE	3
ARGUMENT AND AUTHORITIES FACTUAL BACKGROUND	4
CONTRACTING OFFICER	6
"CONTRACTOR"	7
JUDICIAL REVIEW	11
CONCLUSION	13
APPENDIX A	1a
APPENDIX B	2a
APPENDIX C	11a
APPENDIX D	12a

APPENDIX E 17a

APPENDIX F 17a

TABLE OF AUTHORITIES

CASES **Page**

Alexander v. Commissioner of Internal Revenue, 825 F.2d 499 (D.C. Cir. 1987) 12

American Beef Packers, Inc. v. I.C.C., 711 F.2d 388 (D.C. Cir. 1983) 12

Bedoni v. Navajo-Hopi Indian Relocation Commission, 854 F.2d 321 (9th Cir. 1988) 12

BLH, Inc. v. United States, 13 Cl.Ct. 265 (1987) 8

Fidelity & Deposit Co. of Maryland v. United States, 14 Cl.Ct. 421 (1988) 8

Five Flags Pipeline Co. v. Department of Transportation, 854 F.2d 1438 (D.C. Cir. 1988) 12

Hempstead County and Nevada County Project v. USEPA, 700 F.2d 459 (8th Cir. 1983) 13

In Re: Exclusive Industries Corp., 751 F.2d 806 (5th Cir. 1985) 12

International Union, United Auto, Aerospace and Agricultural Implement Workers of America, U.A.W. v. Donovan, 756 F.2d 162 (D.C. Cir. 1985) 13

Keller v. Petsock, 849 F.2d 839 (3rd Cir. 1988) 12

Travelers Indemnity Co. v. United States, 16 Cl.Ct. 142, 153 (1988) 8

Universal Surety Co. v. United States, 10 Cl.Ct. 794, 800 (1986) 8

Westech Corp. v. United States, 20 Cl.Ct. 745 (1990) 8

STATUTES AND REGULATIONS

24 C.F.R. § 20.4 7

24 C.F.R. §20.4(b) 7

28 U.S.C. §1254(1) 3

28 U.S.C. §1295 6

28 U.S.C. §1295(a)(10) 12

28 U.S.C. §1631 11

31 U.S.C. §3720(A) 10

41 U.S.C. §601, et seq. 6, 8, 10

41 U.S.C. §601(4) 6-8

41 U.S.C. §607 . . . . . 8, 9

41 U.S.C. §607 Historical
and Statutory Notes 9, 11

41 U.S.C. §607(g)(1) 12

41 U.S.C. §607(g)(1)(A) 6, 7, 9

41 U.S.C. §607(g)(1)(B) 9

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V.

JACK KEMP, SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Respondent.

Petition For Writ Of Certorari To The United States Court Of Appeals For The Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Johnnie Blake, respectfully prays that a Writ of Certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Federal Circuit, which opinions dismiss an appeal from a decision of the Board of Contract Appeals of the United States Department of Housing and Urban Development and hold (in effect) that no appeal lies from such Board decision, and in support of such request Petitioner submits the following.

OPINIONS

The final judgments of the Board of Contract Appeals for the United States Department of Housing and Urban Development were signed on December 23, 1991 and February 11, 1992. The decisions appear in App. A and B. Petitioner's motion for rehearing was overruled on March 13, 1992 and appears in App. C.

The United States Court of Appeals dismissed Petitioner's appeal on August 25, 1992. A copy of their decision appears in App. D. On September 23, 1992, the United States Court of Appeals for the Federal Circuit overruled Petitioner's motion for rehearing but invited Petitioner to seek a transfer to a United States District Court. A copy of that decision appears in App. E. However, on November 23, 1992, the United States Court of Appeals for the Federal Circuit denied Petitioner's request for a transfer to a United States District Court, holding that no appeal was proper to such a court. A copy of that decision appears in App. F.

JURISDICTION

1. The Final Judgment of the Board of Contract Appeals for the United States Department of Housing and Urban Development was signed on December 23, 1991, and February 11, 1992, respectively, which appear in App. A and B, respectively.

2. On March 13, 1992, the Board of Contract Appeals denied Petitioner's motion for rehearing, which appears in App. C.

3. The decision of the United States Court of Appeals for the Federal Circuit dismissing the appeal was dated August 25, 1992, and appears in App. D.

4. On September 23, 1992, the United States Court of Appeals for the Federal Circuit denied Petitioner's motion for rehearing but invited Petitioner to request a

transfer to a United States District Court, and appears in App. E.

5. On November 3, 1992, the United States Court of Appeals for the Federal Circuit denied Petitioner's request to transfer the appeal to a United States District Court, and appears in App. F.

6. Petitioner believes that this Court has jurisdiction to review the decisions of the Court of Appeals by virtue of 28 U.S.C. §1254(1). The decisions of the Court of Appeals are internally inconsistent since they hold, first, that an appeal from a decision of a Board of Contract Appeals may not be taken to the United States Court of Appeals for the Federal Circuit but should be taken to a United States District Court; and second, that an appeal from a decision of a Board of Contract Appeals may not be taken to a United States District Court.

STATEMENT OF THE CASE

Petitioner, Johnnie Blake, contested the right of the United States Department of Housing and Urban Development to offset his tax refunds against an obligation allegedly due by him to the Department of Housing and Urban Development, claiming that the obligation due to the Department was not his responsibility, having been judicially absolved of any liability. The Board of Contract Appeals of the Department of Housing and Urban Development held that Petitioner was obligated on the underlying note because the judgment should not have absolved him and that therefore the Department was entitled to seek offsets from any tax refunds due to Johnnie Blake.

From an appeal of this decision by the Board of Contract Appeals, the United States Circuit Court for the Federal Circuit initially dismissed the appeal, holding that Petitioner's right to appeal was to a United States District Court. Thereafter, however, the United States Circuit Court

for the Federal Circuit held that Petitioner's right to appeal was not to a United States District Court.

It is from these conflicting orders and decisions that Jchnnie Blake brings this petition for writ of certiorari.

ARGUMENT AND AUTHORITIES
FACTUAL BACKGROUND

On April 18, 1983, the Honorable Judge Andrew Z. Baker signed a Decree of Divorce in his capacity as Judge of the 306th Judicial District Court of Galveston County, Texas. That Decree of Divorce states, in part, that Rebecca Lynn Blake (Johnnie's former wife) was to pay a promissory note in the original principal sum of $12,000, payable to the order of Amoco Employees Federal Credit Union. About a year later, on April 25, 1984, Johnnie Blake, as movant, filed a motion for enforcement and to clarify the divorce decree. Amoco Federal Credit Union, although not a party to the original divorce decree, was specifically made a party to the motion for clarification.

As is apparent from the language of the motion for clarification and enforcement, Rebecca Lynn Blake was alleged to have failed to pay her portion of several promissory notes, including the $12,000 note; it was further alleged that Amoco Federal Credit Union had deducted monies from Johnnie Blake's paycheck to make the payments which Rebecca Blake was supposed to have made. The motion itself asks that Amoco Federal Credit Union be cited to appear and answer the motion; that the Credit Union reimburse, indemnify, and hold Johnnie Blake harmless for all sums wrongfully paid or to be paid by him on the obligations of Rebecca Blake; and for other relief.

Amoco Federal Credit Union was served with the citation and a copy of the motion for enforcement and clarification and thereafter, the Credit Union answered the lawsuit, alleging that both Johnnie and Rebecca Blake were

liable for the notes, including the $12,000 note. After a hearing, on March 14, 1985, Judge Baker, Judge of the 306th Judicial District Court of Galveston County, Texas, signed his order of enforcement and clarifying judgment. No appeal from that order has been filed and the time for filing one has long since past. That order states, in part:

A. Amoco Federal Credit Union appeared by and through its duly authorized representative and by its attorney and announced ready.

B. Johnnie Blake was required to pay Amoco Federal Credit Union certain sums on *a* note (the $12,000 note is not the note which Johnnie Blake was ordered to pay). (emphasis added).

C. On page two of such court order, the judge states:
"The Court ORDERS that the balance due of $465.15 on that note ordered to be paid by JOHNNIE LOUIS BLAKE *is all he owes as of July 2, 1984, and [Rebecca Lynn Blake] owes the rest*". (emphasis added).

Thereafter, Rebecca Lynn Blake continued to fail to make the payments on the $12,000 note; to the knowledge of counsel for Johnnie Blake, no judicial action against Rebecca Blake has ever been undertaken by the Department of Housing and Urban Development.

After the 1985 court order, Amoco Federal Credit Union transferred and assigned the $12,000 note to the Department of Housing and Urban Development and the

Department, in an effort to collect on the note, sought to request that the Internal Revenue Service pay any refund which might be due to Johnnie Blake to HUD as a payment on the $12,000 note.

It was not contended that the United States Court of Appeals for the Federal Circuit lacked jurisdiction because the decision of the HUD Board of Contract Appeals was not final [it is] or that petitioner waited to file his appeal until after the 120 days time limit set forth in 41 U.S.C. §607(g)(1)(A) [he did not]. Rather, the initial decision of the United States Circuit Court for the Federal Circuit was that there may be no appeal to it since a contracting officer was not involved in this dispute and because petitioner was not a "contractor" as set forth in 41 U.S.C. §601(4).

CONTRACTING OFFICER

Respondent begins its argument by stating, basically correctly, that a federal court only has jurisdiction of those matters granted to it by Congress. (Of course, jurisdiction might also be granted by the Constitution.) However, in neither 28 U.S.C. §1295 nor 41 U.S.C. §601, et seq. is it stated that there may be an appeal *only* when there is a contracting officer involved in a dispute. Congress did *not* impose such a limitation on the jurisdiction of the Court of Appeals for the Federal Circuit.

It is Congress which gave the Circuit Court life and which set forth the jurisdictional limits of that Court. It is *only* Congress which can restrict such jurisdictional limits or remove them entirely. Congress has placed restrictions on Circuit Court's jurisdiction *only* in 28 U.S.C. §1295 and 41 U.S.C. §601, et seq. If any other person or entity seeks to restrict the Court's jurisdiction, the Court rightfully should ignore such an alleged restriction.

One of Respondent's arguments is that, pursuant to 24 C.F.R. § 20.4, the decision of the Board of Contract Appeals is final. That argument has two flaws.

First, the Department of Housing and Urban Development may not pass its own regulations which limit the appealability of decisions which its judicial officers make. Only Congress has that power. If that is what §20.4 of Title 24 of the Code of Federal Regulations means, it is clearly in error.

But, secondly, that is not what it means. Section 20.4 of Title 24 of the Code of Federal Regulations indicates that the decision of the Board of Contract Appeals has "the finality provided by the applicable statute, regulation or agreement." 24 C.F.R. §20.4(b).

The procedural rules governing appeals from a Board of Contract Appeals are dealt with in 41 U.S.C. §607(g)(1)(A). That is the procedural rule which governs appeals from final decisions of the HUD Board of Contract Appeals, and such statute gives Johnnie Blake the right to appeal in this case.

"CONTRACTOR"

A question for the Court of Appeals for the Federal Circuit was whether Petitioner comes within the jurisdictional guidelines set forth by Congress. In other words, is Johnnie Blake a "contractor" as that term is defined by the statutes. Clearly, Johnnie Blake is not a party who hammers and saws. If that were the definition of "contractor", or maybe even had Congress left the term undefined, Johnnie Blake would not have standing in this case.

But Congress has defined that term for us. Congress has stated that a "contractor" is a party to a Government contract other than the Government. 41 U.S.C. §601(4). Johnnie Blake meets that definition under case law.

In *Universal Surety Co. v. United States*, 10 Cl.Ct. 794, 800 (1986), the court held that a surety of a party which had entered into a contract with the government was not a contractor because the surety had not yet taken over the work on which the contractor had defaulted. Clearly, the court is saying, had the surety taken over the job from the contractor, the surety would be considered to be a contractor pursuant to the statutory definition.

To the same effect is *Westech Corp. v. United States*, 20 Cl.Ct. 745, 749 (1990) [surety not a contractor if government terminated contract and surety did not engage in work contracted for]; and *BLH, Inc. v. United States*, 13 Cl.Ct. 265, 271 (1987) [parent company of contractor is not a contractor since it was not liable under contract; the parent company was not a signatory of the contract and was not in privity with the United States].

In *Travelers Indemnity Co. v. United States*, 16 Cl.Ct. 142, 153 (1988), a surety under a payment and performance bond began work under the terms of its bond after the original contractor defaulted. The court held that since the surety had now undertaken such work, it was a contractor under 41 U.S.C. §601, et seq. See, also *Fidelity & Deposit Co. of Maryland v. United States*, 14 Cl.Ct. 421, 423 (1988) which held that "[a]s the Court specifically held in *Universal Surety*, the noncompleting surety is not a contractor within the meaning of [41 U.S.C. §601, et seq.]."

In the instant case, while Johnnie Blake was not originally a party to a government contract, he became a party to a government contract when the credit union assigned the note which Johnnie Blake had signed to HUD. At that instant, there became privity between HUD and Johnnie Blake. Johnnie Blake is, therefore, clearly a contractor as that term is used in the Contract Disputes Act. 41 U.S.C. §601(4).

The Historical and Statutory Notes under 41 U.S.C. §607 states that:

> "Section 8(g)(1) deals with the appeals process available to the contractor and the Government from an adverse decision of an agency board. ... The agency boards of contract appeals as they exist today, and as they would be strengthened by this bill, function as quasi-judicial bodies. Their members serve as administrative judges in an adversary-type proceeding, make findings of fact, and interpret the law. Their decisions set the bulk of legal precedents in Government contract law, and often involved substantial sums of money. In performing this function they do not act as a representative of the agency, since the agency is contesting the contractor's entitlement to relief. ... [I]t would be an anomaly in the American judicial system for such a trial tribunals [sic] to have the final authority on decisions that set important precedents in procurement law."

41 U.S.C. §607 Historical and Statutory Notes

Congress, in passing 41 U.S.C. §607, clearly had in mind that the decisions of the agency boards of contract appeals would not be final and that either party, the "contractor" [41 U.S.C. §607(g)(1)(A)] or the Government [41 U.S.C. §607(g)(1)(B)] would be entitled to appeal from the final decisions of the boards of contract appeals.

In this case, Johnnie Blake who originally was a party to a contract (a promissory note) to which the Government is now (but was not originally) a party, should not be denied his appellate rights. "It would be an anomaly in the American judicial system for [the HUD Board of Contract Appeals] to have the final authority on decisions that set important precedents." 41 U.S.C. §607 Historical and Statutory Notes.

And this is a case involving a novel position by the Government, sustained by the HUD Board of Contract Appeals. The Board held that the Government is *not* bound by principals of *res judicata*, collateral estoppel, and estoppel by judgment in a case in which the Government's assignor was a party -- that the Government may ignore final orders of a state district court when that decision would perhaps prevent (and at least delay) the Government from collecting monies allegedly due to it. HUD's position that it is not bound by *res judicata*, collateral estoppel, or estoppel by judgment is a position which is indeed novel in American jurisprudence.

Respondent argues that the decision of the Board of Contract Appeals was based upon the Deficit Reduction Act [31 U.S.C. §3720(A)] (a substantive law) and not upon the Contract Disputes Act [41 U.S.C. §601, et seq.] (a procedural law). That is not wholly true. It is true that the Deficit Reduction Act allows the Board of Contract Appeals to consider the action which the Secretary of HUD asked it to take -- request the Internal Revenue Service to offset tax refunds which might become due to the taxpayer who has a past due obligation (a contractual obligation) to HUD. The Deficit Reduction Act is the substantive law which allows HUD and the Internal Revenue Service to act. However, the procedural law, governing how it will be determined whether the substantive law is applicable, is the Contract Disputes Act.

Further the decision of the Board of Contract Appeals did not base its decision on the Deficit Reduction Act. It based its decision on its determination [which Johnnie Blake believes to be in error and from which he has appealed] that in fact Johnnie Blake had a contractual relationship with HUD and that the order of the state district court to which HUD's assignor was a party was not binding on HUD if HUD did not want it to be.

HUD also argues that the decision of the Board of Contract Appeals was not made pursuant to Section 8(g)(1) of the Contract Disputes Act of 1978. That is true. There can be no decision of any board of contract appeals pursuant to that section of the statutes. That section deals *solely* with appeal rights of parties, and states that such an appeal is made to the Court of Appeals for the Federal Circuit.

JUDICIAL REVIEW

It was the decision of Circuit Judge Lourie in his decision of August 25, 1992 (App. D) that the jurisdiction to review the decision of the Board of Contract Appeals lies, "if anywhere" in a federal district court.

However, Senior Circuit Judge Friedman in App. F indicates that Petitioner has "not shown that the District Court would have jurisdiction over this case."

It is clear that the Congressional intent was that final decisions of a Board of Contract Appeals are entitled to appellate procedures in the judicial system as opposed to the administrative system. 41 U.S.C. §607 Historical and Statutory Notes.

Pursuant to the terms of 28 U.S.C. §1631, the Circuit Court of Appeals should transfer this appeal to another court in which the appeal could have been brought at the time it was filed or noticed so that the appeal may proceed as if it had been filed or noticed in such court on the date upon which it was actually filed in or noticed for this Court assuming an appeal to the circuit court is not proper.

Petitioner would further show the Court that he is a resident of Santa Fe, in Galveston County, Texas; that such is within the jurisdictional limits of the United States District Court for the Southern District of Texas, and is further within the jurisdictional limits of the Galveston Division of such Court, such District Court being presided over by the Honorable Sam Kent, United States District Judge for the

Southern District of Texas at Galveston. The address of such Court is 601 Rosenberg, Galveston, Texas 77550.

It has been held frequently that a circuit court of appeals should transfer a case which was appealed to it but over which, the court finds, it has no jurisdiction. See, for example, *American Beef Packers, Inc. v. I.C.C.*, 711 F.2d 388 (D.C. Cir. 1983); *Bedoni v. Navajo-Hopi Indian Relocation Commission*, 854 F.2d 321 (9th Cir. 1988); *In Re: Exclusive Industries Corp.*, 751 F.2d 806 (5th Cir. 1985); *Five Flags Pipeline Co. v. Department of Transportation*, 854 F.2d 1438 (D.C. Cir. 1988).

Furthermore, it is in the interest of justice that such transfer be made. It is a close question whether or not an appeal from the administrative order of the United States Department of Housing and Urban Development Board of Contract Appeals should be made to the district court or the Court of Appeals for the Federal Circuit. This is especially true when a law clerk of the Board of Contract Appeals informed counsel for Petitioner (which she orally did) that it did not know to which court an appeal should be taken and when an attorney with the United States Department of Housing and Urban Development in Fort Worth, Texas, indicated to counsel for Petitioner (which he orally did) that *clearly* an appeal should be taken to the United States Court of Appeals for the Federal Circuit under 28 U.S.C. §1295(a)(10) and 41 U.S.C. §607(g)(1).

Petitioner would further show to the Court that it is the policy of the United States Congress and the courts of the United States that there be appropriate appellate procedures into the judicial system from administrative decisions of boards of contract appeals; Petitioner has diligently attempted to assert his right to appeal from a decision of the Board of Contract Appeals for the United States Department of Housing and Urban Development; and Petitioner is entitled to receive valid appellate review. See, for example, *Keller v. Petsock*, 849 F.2d 839 (3rd Cir. 1988); *Alexander v.*

Commissioner of Internal Revenue, 825 F.2d 499 (D.C. Cir. 1987). It has been held proper and appropriate to transfer a case when such is possible, rather than to dismiss it. See, for example, *International Union, United Auto, Aerospace and Agricultural Implement Workers of America, U.A.W. v. Donovan*, 756 F.2d 162 (D.C. Cir. 1985); *In re Exclusive Industries Corp.*, 751 F.2d 806 (5th Cir. 1985); *Hempstead County and Nevada County Project v. USEPA*, 700 F.2d 459 (8th Cir. 1983).

Petitioner has complied fully with all applicable procedures governing appeals from the administrative action against him by the HUD Board of Contract Appeals, and his appeal from such decision should not be dismissed.

CONCLUSION

JOHNNIE BLAKE prays that this Court issue its writ of certiorari , reverse the decision of the United States Court of Appeals for the Federal Circuit, and remand this matter to the Federal Circuit to consider JOHNNIE BLAKE's appeal on its merits or, alternatively, to transfer this matter to a district court for trial.

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INDEX TO APPENDICES

APPENDIX A	Decision and Order (of December 20, 1991) of the Board of Contract Appeals of the United States Department of Housing and Urban Development
APPENDIX B	Decision and Order (of February 11, 1992) of the Board of Contract Appeals of the United States Department of Housing and Urban Development
APPENDIX C	Ruling on Petitioner's Motion for Reconsideration (of March 13, 1992) of the Board of Contract Appeals of the United States Department of Housing and Urban Development
APPENDIX D	Order (of the United States Court of Appeals for the Federal Circuit, dated August 25, 1992)
APPENDIX E	Order (of the United States Court of Appeals for the Federal Circuit, dated September 23, 1992)
APPENDIX F	Order (of the United States Court of Appeals for the Federal Circuit, dated November 23, 1992)

APPENDIX A
Board of Contract Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:	HUDBCA No. 91-G-6908-N601
JOHNNIE BLAKE,	:	Claim No. 7-70222369-0
Petitioner.	:	

DECISION AND ORDER

Based upon a review of the record before me, I find that the Petitioner has failed to submit evidence which proves that the alleged indebtedness to the Department is unenforceable or not past due.

That portion of the Order previously issued in the above-captioned matter is hereby vacated and the stay of referral is lifted. the Secretary of the U.S. Department of Housing and Urban Development is authorized to refer the debt which is the subject of these proceedings to the Internal Revenue Service in accordance with 31 U.S.C. § 3720A for offset against any refund which is owing to Petitioner with respect to Petitioner's 1991 Federal income tax return.

A full text of the decision entered in this case will follow.

/s/ Timothy J. Greszko
Timothy J. Greszko
Administrative Judge

December 20, 1991

APPENDIX B

Board of Contract Appeals
Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:	
	:	HUDBCA No. 91-G-
JOHNNIE BLAKE,	:	6908-N601
	:	
Petitioner.	:	Claim No. 7-70222369-0

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DECISION AND ORDER

Petitioner was notified by a Notice of Intent that, pursuant to 31 U.S.C. § 3720A, the Secretary of the U.S. Department of Housing and Urban Development ("HUD") intended to seek offset by the Internal Revenue Service ("IRS") of any tax refund due to Petitioner against a claimed past-due legally enforceable debt of Petitioner to HUD. Petitioner filed a timely request to present evidence that the debt was not past-due or not legally enforceable. As a result of that request, referral of the debt for offset by IRS was temporarily stayed. Both Petitioner and the Secretary have

filed written submissions and evidence in support of their positions. On December 20, 1991, an interim Decision and Order was issued which authorized the Secretary to refer this debt to the IRS for offset against any 1991 Federal tax refund due Petitioner. This is the full-text of the Decision and Order.

Findings of Fact

1. On January 29, 1982, Petitioner and Rebecca Lynne Blake executed and delivered to Amoco Federal Credit Union ("Amoco"), a promissory note for a property improvement loan ("the agreement") in the principal amount of $12,000.00, that was insured against nonpayment by the Secretary pursuant to Title I of the National Housing Act, 12 U.S.C. § 1703. (Govt. Exh. A).

2. On April 19, 1983, a decree of divorce was issued by the Family Court of Galveston County, Texas ("Court"), dissolving the marriage of Petitioner and Rebecca Lynne Blake. Amoco was not a party to that proceeding. The decree provided the following distribution of responsibility for the debt due under the agreement:

> It is DECREED that [Rebecca Lynne Blake] shall pay, as a part of the division of the estate of the parties, the following debts and obligations and shall indemnify and hold [Johnnie Louis Blake] harmless from any failure to so discharge such debts and liabilities:
>
> a. The balance due, including principal and interest, on that certain Promissory Note executed by JOHNNIE LOUIS

> BLAKE and REBECCA LYNNE BLAKE, in the original principal sum of $12,000.00, payable to the order of Amoco Employees Federal Credit Union, and secured by a Deed of Trust on the real property herein awarded to [Rebecca Lynne Blake].

The decree also made Rebecca Lynne Blake responsible for payment on three other promissory notes payable to Amoco, including notes for the purchase of a 1982 Chevrolet pick-up truck, a boat, motor and trailer, and for certain furniture to the extent it was awarded to her by the decree. With respect to these three notes, Rebecca Lynne Blake was ordered to "indemnify and hold harmless [Petitioner] from any failure to so discharge such debts and liabilities." (Govt. Exh. C).

3. On May 21, 1984, Petitioner filed a motion in the Court, seeking enforcement and clarification of the divorce decree. In that motion, Amoco was specifically made a party to the proceeding. The motion alleged, *inter alia*, that Petitioner's former spouse had failed to indemnify and hold harmless Petitioner on the $12,000.00 promissory note at issue; that she had failed and refused to pay her portion of a number of other promissory notes as obligated under the divorce decree; and that Amoco had on several occasions deducted sums of money from Petitioner's pay to cover obligations of his former spouse. Amoco was served with notice of the hearing on the motion and copy of the motion. (Petitioner's Exhs. F, G).

4. Amoco filed an answer on April 30, 1984, asserting that Petitioner and his former spouse are jointly and severally liable on the notes mentioned in Petitioner's motion, and that the court lacks jurisdiction to disturb the rights which creditors lawfully have against the parties. (Petitioner's Exh. H).

5. The Court entered an order on March 14, 1985, after examining the pleadings and listening to evidence and argument of counsel. The order states, in relevant part, that:

> The Court finds that on April 5, 1983, JOHNNIE LOUIS BLAKE and REBECCA LYNNE BLAKE owed AMOCO FEDERAL CREDIT UNION $1,630.73 on a note in the original principal sum of $2000.00; $401.16 on a note in the original principal sum of $492.00; and $5225.89 on a note in the original principal sum of $6400.00, for a total of $7,257.78.
>
> IT IS DECREED that JOHNNIE LOUIS BLAKE shall pay, as a part of the division of the estate of the parties, the debt and obligation owing to AMOCO FEDERAL CREDIT UNION and shall indemnify and hold REBECCA LYNNE BLAKE harmless from any failure to discharge the balance due, including principal and interest, on that portion of the promissory note in the original principal amount of $2,000.00 payable to AMOCO FEDERAL CREDIT UNION the sum of $1,630.73 representing that part of the

balance due as of April 5, 1983, to AMOCO FEDERAL CREDIT UNION given as part of the purchase price and secured by a lien on the 1983 Chevrolet pickup truck.

IT IS DECREED that REBECCA LYNNE BLAKE shall pay, as a part of the division of the estate of the parties, the debt and obligation owing to AMOCO FEDERAL CREDIT UNION and shall indemnify and hold JOHNNIE LOUIS BLAKE harmless from any failure to so discharge such balance due, including principal and interest, on that portion of the promissory notes in the original principal amounts of $492.00 and $6,400.00 payable to the order of AMOCO FEDERAL CREDIT UNION the sum of $401.16 and also $5,225.89 representing the balance due as of April 5, 1983, to AMOCO FEDERAL CREDIT UNION on those amounts secured by a lien on furniture awarded to [her] and the 1979 Cain cutter boat, 70 horsepower Evinrude motor and trailer awarded to her.

The Court finds that the monthly payments due on the note herein ordered to be paid by JOHNNIE LOUIS BLAKE are $76.00 per month and the total including interest that would have been due from him as of July 2, 1984, equals $1,165.69. The total amount paid by him between April 4, 1983, and July 2, 1984 equals $1,268.10. The Court ORDERS that the balance due of $465.15 on that note ordered to be paid by JOHNNIE LOUIS BLAKE is all he owes as of July 2, 1984, and [his former spouse] owes the rest.

> It is further ORDERED, ADJUDGED, and DECREED that JOHNNIE LOUIS BLAKE have judgment against REBECCA LYNNE BLAKE for the sum of $102.46, with interest thereon from the date hereof until paid at the rate of 10% per annum, for which let execution issue. Said sum represents the amount paid to AMOCO FEDERAL CREDIT UNION BY JOHNNIE LOUIS BLAKE to date of $1,268.10 minus the amount due on his portion of the notes equaling $1,165.64. (Petitioner's Exh. I).

7. Petitioner and his former spouse failed to make payments as promised in the agreement, and the agreement is in default. Consequently, Amoco assigned the agreement to the United States of America on September 27, 1988, by endorsement on the back of the agreement, in accordance with 24 C.F.R. §201.54. The Secretary is the holder of the agreement on behalf of the United States of America. (Secretary's Exhibit A).

8. Petitioner is currently in default on the agreement. HUD has attempted to collect on the agreement from Petitioner by means other than offset, but has been unsuccessful. The Secretary contends that Petitioner is indebted to HUD on the agreement in the following amounts:

> (a) $7,562.56 as the unpaid principal balance as of October 11, 1991;
>
> (b) $1,635.87 as the unpaid interest on the principal at 7.0% per annum through October 11, 1991; and

(c) interest on the principal balance from October 12, 1991, at 7.0% per annum until fully paid. (Attachment to Secretary's Statement dated October 11, 1991, Declaration of Gordon L. Brandhagen).

Discussion

The Deficit Reduction Act of 1984, 31 U.S.C. § 3720A ("the Act") provides Federal agencies with a remedy for the collection of debts owed to the United States Government. The Act places the primary burden of proof on the debtor to establish by documentary evidence or application of law that the claimed debt is not past-due or not enforceable. 31 U.S.C. § 3720A(b)(2); *Ronald Durr*, HUDBCA No. 86-1422-F413 (Mar. 28, 1986).

Petitioner contends that the debt is not legally enforceable because: (1) the March 15, 1985 court order released Petitioner from any obligations to pay the debt which the Secretary seeks to enforce in this action; and (2) Amoco is bound by that order because it was a party to that proceeding.

The Secretary contends, *inter alia*, that the debt is legally enforceable because: (1) the March 15, 1985 court order makes no mention of the subject debt; and (2) Petitioner's interpretation of that order is unreasonable. For the reasons set forth below, I find the Secretary's position more persuasive.

While I agree with Petitioner's contention that Amoco was a party to the later divorce proceeding, I do not find that

fact dispositive, *per se*, of the issue of Petitioners's liability under the agreement. The order entered by the court does not state that Petitioner is "released" from liability under any of the notes, and for unexplained reasons, does not make specific mention of the $12,000.00 note. That order does not require Amoco to do anything or refrain from doing anything with respect to the obligation in question. Moreover, the order states that Petitioner and his former spouse, not Amoco, shall indemnify and hold each other harmless on their respective obligations under the order. I find this indemnification language antithetical to the notion of release, as it connotes compensation for loss or damage that might later occur. If the order released Petitioner from further liability, the indemnification language would not be necessary.

In addition, Petitioner's interpretation of the order is unreasonable, because it is unduly narrow and strained. The words Petitioner relies upon are taken completely out of context with the sentence in which they are found, which refers specifically to a note secured by a lien on a pickup truck. At the very least, these words refer to the note underlying the pickup truck transaction, and at most, the three notes mentioned in the order. I find no basis to apply these words to a note that is not referenced in the order.

It is well-settled law in Texas that divorce courts lack jurisdiction to disturb the rights of a creditor to collect from either of the divorcing parties on an obligation that is joint and several. *Wileman v. Wade*, 665 S.W.2d 519 (Tex. Civ. App. 1984) citing *Broadway Drug Store of Galveston, Inc. v. Trowbridge*, 435 S.W.2d 268 (Tex. Civ. App. 1968). Likewise, it is well-settled that trial court judges are presumed to know the law and apply it correctly. *Walton v. Arizona*, 110 S. Ct. 3057 (1990) and cases cited therein. I am not convinced, as Petitioner argues, that the judge

incorrectly applied the law by releasing Petitioner in his March, 14, 1985 order. To the contrary, the more reasonable interpretation of that order is that it did not affect Amoco's rights, under Texas law, to collect the debt from Petitioner, his former spouse, or both. Since Amoco's rights were not affected by that order, HUD, the assignee of the defaulted loan, is not constrained by that order from seeking to recover sums due and owing.

Order

For the foregoing reasons, I find that Petitioner is indebted to HUD in the amounts set forth in Finding of Fact No. 8. The order dated September 23, 1991 imposing the stay of referral of this matter to the Internal Revenue Service is vacated. It is hereby ORDERED that the Secretary of the U.S. Department of Housing and Urban Development is authorized to refer the debt to the Internal Revenue Service as found past-due and owing in this Decision and Order.

/s/ Timothy J. Greszko
Timothy J. Greszko
Administrative Judge

February 11, 1992

APPENDIX C

Board of Contract Appeals
U.S. Department of Housing and Urban Development
Washington, D.C. 20410-0001

In the Matter of:	:	
	:	HUDBCA No. 91-G-
JOHNNIE BLAKE,	:	6908-N601
	:	
Petitioner.	:	Claim No. 7-70222369-0

Kenneth C. Kaye, Esq. — For the Petitioner
913 West Main
League City, Texas 77517

Steven Ringold, Esq. — For the Secretary
HUD Seattle Regional Office
Arcade Plaza Building
1321 Second Avenue
Seattle, WA 98101-2058

RULING ON PETITIONER'S MOTION FOR RECONSIDERATION

Upon full consideration of the arguments raised in Petitioner's Motion for Reconsideration and First Amended Motion for Reconsideration, and the Secretary's response thereto, Petitioner's motion is **DENIED**.

/s/ Timothy J. Greszko
Timothy J. Greszko
Administrative Judge

March 13, 1992

APPENDIX D

Note: Pursuant to Fed. Cir. R. 47.., this order is not citable as precedent. It is a public record.

United State Court of Appeals
for the Federal Circuit

92-1339

JOHNNIE BLAKE,
Appellant.

v.

Jack Kemp. SECRETARY OF HOUSING AND URBAN DEVELOPMENT,
Appellee.

ON MOTION

Before ARCHER, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

LOURIE, *Circuit Judge*.

ORDER

The United States moves to dismiss Jonnnie Blake's (Blake) appeal for lack of jurisdiction. Blake opposes.

This matter stems from an appeal of a decision of the United States Department of Housing and Urban Development Board of Contract Appeals (HUDBCA or Board), holding that the Department of Housing and Urban

Development (HUD) held a legally enforceable debt against Blake that could be referred to the Internal Revenue Service (IRS) for collection under the Deficit Reduction Act, 31 U.S.C. § 3720(A) (1990).

I.

Under the Deficit Reduction Act, a federal agency owed a "past due legally enforceable debt" may refer the debt to the IRS for offset collection through tax intercept. 31 U.S.C. § 3720(A)(a). Federal agencies seeking to use the IRS offset program must promulgate regulations governing its operation within the agency. 26 C.F.R. § 301.6402-6T(b)(1) (1988). Pursuant to this requirement, HUD issued regulations governing general offset procedures. Under these regulations, HUD must first establish that the debt is owed and past due, and must then provide the debtor with written notice of the proposed IRS offset. 24 C.F.R. § 17.153 (1991). If the debt is disputed, the debtor has a right to present evidence before the HUDBCA. After weighing the evidence, the Board must determine whether the debt is delinquent and enforceable. The decision of the Board constitutes the final agency decision concerning the referral of a debt to the IRS for collection. 24 C.F.R. § 17.153 (1991).

II.

On January 29, 1982, Blake and his former wife, Rebecca Lynne Blake, executed a promissory note with the Amoco Federal Credit Union (Amoco) for a $12,000 home improvement loan. The Secretary of HUD insured the loan against nonpayment. Blake and his former spouse defaulted on the note, and Amoco assigned the loan to the Secretary of HUD for collection. After several unsuccessful attempts to collect on the loan agreement, HUD notified Blake that it

would request the IRS to offset the debt against any tax refund due him. Blake filed a request to present evidence before the Board that the debt was neither past due nor enforceable against him. After reviewing the evidence, the Board authorized the Secretary of HUD to refer the debt to the IRS for tax refund offset. This appeal followed.

III.

It is well settled that federal courts are courts of limited jurisdiction marked out by Congress. *Finley v. United States*, 109 S.Ct. 2003, 2006 (1989) *citing The Mayor v. Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868). Pursuant to 28 U.S.C. § 1295(10) (1988), this court has jurisdiction over an appeal from a final decision of an agency board of contract appeals which has been rendered pursuant to the Contract Disputes Act, 41 U.S.C. § 601 *et seq.* (1988). Blake maintains that jurisdiction is proper here because the assignment of his loan agreement created a contractual relationship between himself and the United States cognizable under the Contract Disputes Act.

The Contract Disputes Act applies to contracts entered into by an executive agency for:

> (1) the procurement of property, other than real property in being;
> (2) the procurement of services;
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
> (4) the disposal of personal property.

41 U.S.C. § 602(a) (1988).

Assuming without deciding that Blake has contractual privity with the government based on his assigned loan agreement, Blake's contract with HUD falls well outside the scope of the Contract Disputes Act. The United States was not a party to the original loan agreement. As the insurer of the note, the United States reimbursed the lender for the defaulted loan and proceeded against Blake for the balance of the note. *See* 12 U.S.C. § 1703 (1989). In doing so, the United States merely acted in furtherance of a longstanding government policy designed to encourage lending for the rehabilitation of private housing, and therefore did not benefit directly from the loan agreement. *See Citizens Nat. Trust and Sav. Bank of Los Angeles v. United States*, 270 F.2d 128, 133 (9th Cir. 1959). Moreover, the actual relationship between Blake and HUD was not that of buyer and seller. Clearly, the loan agreement cannot be characterized as a contract with an executive agency for the procurement of goods, services or property or the disposal of personal property. Nor is the contract for the construction, alteration, maintenance, or repair of real property. Hence, the Contract Disputes Act does not extend to Blake's contract.

As we recognized in *G.E. Boggs and Assocs., Inc. v. Roskens*, No. 91-1214 (Fed. Cir. July 2, 1992), not all government contracts are within the purview of the Contract Disputes Act. In *Boggs*, the court held that it lacked jurisdiction over an appeal from a decision of a Board of Contract Appeals where the Board's jurisdiction was not predicated on the Contract Disputes Act. *Boggs*, slip op. at 11. In the present case, the Secretary of HHS conferred jurisdiction on the Board under 24 C.F.R. § 20.4(b) (1991), to entertain Blake's claim. As in *Boggs*, the Board retained jurisdiction over his action without resort to the Contract Disputes Act. Because this court can only review Board decisions rendered pursuant to the Contract Disputes Act, 28

U.S.C. § 1295(10), we must dismiss Blake's appeal for lack of jurisdiction. Jurisdiction to review the HUDBCA's decision referring Blake's loan to the IRS for collection lies, if anywhere, in federal district court. *See Jones v. Cavazos*, 889 F.2d 1043 (11th Cir. 1989); *Grider v. Cavazos*, 911 F.2d 1158(5th Cir. 1990); *Hurst v. United States Dep't of Educ.*, 901 F.2d 836 (10th Cir. 1990).

Accordingly,

IT IS ORDERED THAT:

The United States' motion to dismiss is granted.

FOR THE COURT

AUG 25 1992
Date

/s/ Alan D. Lourie
Alan D. Lourie
Circuit Judge

ISSUED AS A MANDATE: AUG 25 1992

cc:Kenneth C. Kaye, Esq.
Cynthia D. Walicki-Chan,Esq.

FILED
U.S. COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
AUG 25 1992

FRANCIS X. GINDHART
CLERK

APPENDIX E

NOTE: Pursuant to Fed. Cir. R. 47., this order is not citable as precedent. It is a public record.

United State Court of Appeals
for the Federal Circuit

92-1339

JOHNNIE BLAKE,

Appellant,

v.

Jack Kemp, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,

Appellee.

ON MOTION FOR RECONSIDERATION

Before ARCHER, *Circuit Judge*, BENNETT, *Senior Circuit Judge*, and LOURIE, *Circuit Judge*.

LOURIE, *Circuit Judge*.

ORDER

Johnnie Blake moves for reconsideration of the court's August 25, 1992 order dismissing his appeal for lack of jurisdiction. In the alternative, Blake moves for a transfer to "the district court which [this court] believes to have

appropriate jurisdiction of such an appeal."[1]

Blake's motion for reconsideration on the merits is denied. However, we will permit Blake to submit a proper motion to transfer, if he desires, to a specific district court. The United States may respond thereto.

Accordingly,

IT IS ORDERED THAT:

(1) Blake's motion for reconsideration on the merits is denied.

(2) Any motion to transfer should be filed within 10 days.

FOR THE COURT

SEP 23 1992
Date

/s/ Alan D. Lourie
Alan D. Lourie
Circuit Judge

cc: Kenneth C. Kaye, Esq.
Cynthia Walicki-Chan, Esq.

FILED
U.S. COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
SEP 23 1992

FRANCIS X. GINDHART
CLERK

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1. Blake also states in the body of his motion that he is suggesting that the court rehear the case in banc. Blake's "suggestion" does not conform to the rules governing suggestions. Fed. R. App. 35 and Fed. Cir. R. 35. Thus, the Court will not consider it as such.

APPENDIX F

NOTE: Pursuant to Fed. Cir. R. 47. this order is not citable as precedent. It is a public record.

United States Court of Appeals
for the Federal Circuit

92-1339

JOHNNIE BLAKE,
Appellant,

v.

Jack Kemp, SECRETARY OF
HOUSING AND URBAN DEVELOPMENT,
Appellee.

ON MOTION

Before FRIEDMAN, *Senior Circuit Judge*.

O R D E R

Johnnie L. Blake moves to transfer to the United States District Court for the Southern District of Texas. The Secretary of Housing and Urban Development opposes.

On August 25, 1992, this court granted the Secretary's motion to dismiss Blake's appeal. The court concluded that although this appeal was from a decision of the Department of Housing and Urban Development's Board of Contract Appeals (Board), the Board's decision concerning the referral of a debt to the Internal Revenue Service for collection through tax refund offset was not rendered

pursuant to the Contract Disputes Act. The court noted that jurisdiction to review the tax refund offset would lie, if anywhere, in federal district court.

Blake moved for reconsideration and in the alternative to transfer to "the district court which [this court] believes to have appropriate jurisdiction of such an appeal." On September 23, 1992, the court denied Blake's motion for reconsideration, but allowed Blake the opportunity to submit a proper and more specific motion to transfer within 10 days.

A transfer to cure a lack of jurisdiction is governed by 28 U.S.C. § 1631. Pursuant to Section 1631, if a court determines that it lacks jurisdiction over a case,

> the court shall, if it is in the interest of justice, transfer such action or appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed, and the action or appeal shall proceed as if it had been filed in or noticed for the court to which it is transferred on the date upon which it was actually filed in or noticed for the court from which it is transferred.

Blake has not demonstrated that it is in the interest of justice to transfer this case to the district court. Blake merely states that "it is a close question of whether or not an appeal from [the Board] should be made to the district court" or this court and that counsel for Blake received inconclusive or erroneous advice from others concerning the proper avenues for challenging the Board's determination. Nor has Blake demonstrated that there are any time restrictions to his bringing a suit in a district court so that transfer is necessary. *See*, *generally*, *Grider v. Cavazos*, 911 F.2d 1158 (5th Cir.

1990); *Hurst v. United States Dep't of Educ.*, 901 F.2d 836 (10th Cir. 1990); *Jones v. Cavazos*, 889 F.2d 1043 (11th Cir. 1989); *Thomas v. Bennett*, 856 F.2d 1165 (8th Cir. 1988); *Roberts v. Bennett*, 709 F.Supp. 222 (N.D. Ga. 1989); *Richardson v. Baker*, 663 F.Supp. 651 (S.D. N.Y. 1987). Indeed, Blake has not shown that the district court would have jurisdiction over this case.

Accordingly,

IT IS ORDERED THAT:

Blake's motion to transfer is denied.

11/23/92
Date

/s/ illegible
Daniel M. Friedman
Senior Circuit Judge

cc: Kenneth C. Kaye, Esq.
Cynthia D. Walicki-Chan, Esq.

FILED
U.S.COURT OF APPEALS FOR
THE FEDERAL CIRCUIT
NOV 24 1992

FRANCIS X. GINDHART
CLERK

Supreme Court, U.S.
FILED
MAR 2 1993

No. 92-1094

In the Supreme Court of the United States

OCTOBER TERM, 1992

JOHNNIE BLAKE, PETITIONER

v.

HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WILLIAM C. BRYSON
Acting Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

DAVID M. COHEN
CYNTHIA D. WALICKI-CHAN
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Department of Justice
Washington, D.C. 20530
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QUESTIONS PRESENTED

1. Whether the court of appeals lacked jurisdiction under 28 U.S.C. 1295(a)(10) to entertain petitioner's appeal from a decision of the Housing and Urban Development Board of Contract Appeals, when the decision appealed from was not within the scope of the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*

2. Whether the court of appeals properly denied petitioner's motion to transfer the case to a district court under 28 U.S.C. 1631, when petitioner failed to demonstrate that it was in the interest of justice to do so.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	2
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bollman, Ex parte, 8 U.S. (4 Cranch) 75 (1807)	5
Christianson v. *Colt Indus. Operating Corp.*, 486 U.S. 800 (1988)	5
Coastal Corp. v. *United States*, 713 F.2d 728 (Fed. Cir. 1983)	6-7
Finley v. *United States*, 490 U.S. 545 (1989)	5
G.E. Boggs & Assocs. v. *Roskens*, 969 F.2d 1023 (Fed. Cir. 1992)	6
New Era Constr. v. *United States*, 890 F.2d 1152 (Fed. Cir. 1989)	6
The Mayor v. *Cooper*, 73 U.S. (6 Wall.) 247 (1868)	5

Statutes and regulations:

Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.*	3
41 U.S.C. 601(4)	6
41 U.S.C. 602(a)	4, 6
41 U.S.C. 607(g)(1)	6
28 U.S.C. 1295(a)(10)	3, 5
28 U.S.C. 1631	4, 7
28 U.S.C. 3720A	3
24 C.F.R.:	
Sections 17.150 *et seq.*	3
Section 17.152	3, 5
Section 17.153	5
Section 20.4(b)	5
Section 201.54	3

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 92-1094

JOHNNIE BLAKE, PETITIONER

v.

HENRY G. CISNEROS, SECRETARY OF HOUSING AND URBAN DEVELOPMENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals dismissing petitioner's appeal for lack of jurisdiction (Pet. App. 12a-16a) is unpublished, but the decision is noted at 979 F.2d 215 (Table). The orders of the court of appeals denying reconsideration and permitting the filing of a motion to transfer (Pet. App. 17a-18a), and finally denying petitioner's motion to transfer (Pet. App. 19a-21a) are unreported. The decision of the Housing and Urban Development Board of Contract Appeals (HUDBCA or Board) authorizing the Secretary to refer petitioner's debt to the Internal Revenue Service (Pet. App. 1a-10a) is

unreported, as is the Board's denial of petitioner's motion for reconsideration (Pet. App. 11a).

JURISDICTION

The order of the court of appeals dismissing petitioner's appeal was entered on August 25, 1992, and the order denying his motion for reconsideration was entered on September 23, 1992. The court of appeals' order denying petitioner's motion to transfer was filed on November 24, 1992. The petition for a writ of certiorari was filed on December 22, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1982, petitioner Johnnie Blake and his former wife, Rebecca Lynne Blake, obtained a $12,000 property improvement loan from the Amoco Federal Credit Union (Amoco) and executed a promissory note in exchange. The loan was insured by the United States Department of Housing and Urban Development (HUD). Pet. App. 3a, 13a. Petitioner and his wife divorced in 1983. The divorce decree from Galveston County Family Court, to which neither Amoco nor HUD was a party, provided that Rebecca Blake would pay the debt to Amoco and would indemnify petitioner for his failure to pay that debt. Pet. App. 3a-4a.

In 1984, petitioner asked the Galveston County Family Court to enforce and clarify the divorce decree. In that proceeding, petitioner alleged that his ex-wife had refused to make payments on various debts, including the promissory note at issue here, and that as a result Amoco had garnished money from his paycheck. Pet. App. 4a. Amoco was made a party to the proceeding, and claimed that petitioner and his ex-wife were jointly and severally liable on the note. Pet. App. 4a-5a. The court issued rulings on various obligations of petitioner and his former wife other than the $12,000 note, but did not

release petitioner from liability to Amoco as to any of those debts. The court did not mention the $12,000 note at all. Pet. App. 5a-7a, 9a.

When neither petitioner nor his ex-wife made payments on the property improvement loan, Amoco assigned the debt to HUD in accordance with 24 C.F.R. 201.54. Pet. App 7a. After several attempts to collect on the loan, HUD notified petitioner that, pursuant to 31 U.S.C. 3720A and 24 C.F.R. 17.150 *et seq.*, it intended to ask the Internal Revenue Service (IRS) to offset the debt against any tax refund due to him. Pet. App. 13a-14a.

2. Petitioner filed a timely request to present evidence to the HUDBCA, pursuant to 24 C.F.R. 17.152, that the debt was not legally enforceable. The Board noted that the divorce court's order did not purport to release petitioner from any obligation to Amoco, and observed that, under well-settled law, Texas divorce courts have no power to disturb a creditor's right to collect from either party to a divorce on an obligation that the couple incurred jointly. The Board therefore concluded that HUD, as assignee of the defaulted loan, had the right to recover the amount owed by referring the debt to the IRS pursuant to 31 U.S.C. 3720A. Pet. App. 9a-10a. The Board denied petitioner's motion for reconsideration. Pet. App. 11a.

3. Petitioner then appealed the decision of the HUDBCA to the United States Court of Appeals for the Federal Circuit, but that court dismissed the appeal for lack of jurisdiction. The court of appeals noted that, under 28 U.S.C. 1295(a)(10), it has jurisdiction over a final decision of an agency board of contracts appeals only if that decision was made pursuant to the Contract Disputes Act of 1978, 41 U.S.C. 601 *et seq.* Because the United States did not benefit directly from the loan agreement and because the relationship between HUD and petitioner was not that of buyer and seller, the court held

that the loan agreement was not a procurement contract. Nor did the agreement provide for the disposal of personal property. The court therefore held that, even if petitioner was in contractual privity with HUD, his contract did not fall within the scope of the Contract Disputes Act, as outlined in 41 U.S.C. 602(a). The court stated that the only forum that might have jurisdiction to review the HUDBCA decision was a federal district court. Pet. App. 14a-16a.

4. Petitioner then filed a motion for reconsideration of the decision of the court of appeals. While that motion was pending, petitioner directly petitioned the United States District Court for the Southern District of Texas for review of the same HUDBCA decision. Pet. for Rev. of Admin. Order, No. G-92-455 (S.D. Tex. filed Sept. 22, 1992). Shortly thereafter, the court of appeals denied petitioner's motion for reconsideration, but granted petitioner leave to file a proper motion to transfer the appeal to a specific district court within ten days. Pet. App. 17a-18a. Petitioner then filed a motion in the court of appeals to transfer the case to the United States District Court for the Southern District of Texas. Pet. App. 19a.

The court of appeals denied petitioner's motion to transfer. The court noted that, under 28 U.S.C. 1631, cases should be transferred to cure a lack of jurisdiction "if it is in the interest of justice" to do so. The court held, however, that petitioner had failed to demonstrate that it was in the interest of justice to transfer this case. In particular, petitioner had not shown that the district court would have jurisdiction or that any time restrictions prevented him from seeking relief there in an original action. Pet. App. 20a-21a.

ARGUMENT

Petitioner contends that the court of appeals had jurisdiction over his appeal and, in the alternative, that the court erred in denying his motion to transfer the case to a district court. The decisions of the court of appeals were correct, however, and they do not conflict with any decision of this Court or of any court of appeals. Further review is therefore not warranted.

1. The court of appeals correctly determined that it lacked jurisdiction over petitioner's appeal. This Court has long held that the jurisdiction of the lower federal courts must be established by Congress. See, *e.g.*, *Finley* v. *United States*, 490 U.S. 545, 547-548 (1989); *The Mayor* v. *Cooper*, 73 U.S. (6 Wall.) 247, 252 (1868). "[C]ourts which are created by written law, and whose jurisdiction is defined by written law, cannot transcend that jurisdiction." *Finley*, 490 U.S. at 547 (quoting *Ex parte Bollman*, 8 U.S. (4 Cranch) 75, 93 (1807)). Even in the interest of justice, courts may not extend their jurisdiction if none exists. *Christianson* v. *Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

Petitioner contends that the court of appeals had jurisdiction under 28 U.S.C. 1295(a)(10), which provides that the Federal Circuit may review "final decision[s] of an agency board of contract appeals pursuant to section 8(g)(1) of the Contract Disputes Act of 1978 (41 U.S.C. 607(g)(1))." Although this case does involve a decision of an agency board of contract appeals, that decision was not issued pursuant to the Contract Disputes Act.* The

---

* Under 24 C.F.R. 20.4(b), the Secretary of HUD may assign "other matters" to HUDBCA. By regulation, the Secretary has directed the Board to decide, upon challenge, whether a debt owed to HUD and referred to the IRS for offset under 31 U.S.C. 3720A is past due and legally enforceable. 24 C.F.R. 17.152-17.153.

only executive agency contracts covered by the Contract Disputes Act are

> express or implied contract[s] * * * for —
>
> (1) the procurement of property, other than real property in being;
>
> (2) the procurement of services;
>
> (3) the procurement of construction, alteration, repair or maintenance of real property; or,
>
> (4) the disposal of personal property.

41 U.S.C. 602(a). As the court of appeals held (Pet. App. 15a), HUD did not agree to buy any property or services from petitioner, nor did the agency hire petitioner to dispose of any personal property. HUD realized no direct benefit from the transaction; as insurer, HUD merely furthered the general government policy encouraging lending for the rehabilitation of private housing. See *New Era Constr.* v. *United States*, 890 F.2d 1152, 1157-1158 (Fed. Cir. 1989). Thus, petitioner was not a party to a "Government contract" covered by the Contract Disputes Act, and so he is not a "contractor" under that Act. See 41 U.S.C. 601(4). He therefore may not appeal to the Federal Circuit under Section 8(g)(1) of the Act, 41 U.S.C. 607(g)(1).

Petitioner emphasizes that 41 U.S.C. 601(4) defines "contractor" as "a party to a Government contract other than the Government" and claims that he became a party to a "Government contract" when his promissory note was assigned to HUD. Pet. 7-9. But even assuming that petitioner is in contractual privity with the government, it is well established that not all contracts involving the government fall within the purview of the Contract Disputes Act. See, *e.g.*, *G.E. Boggs & Assocs.* v. *Roskens*, 969 F.2d 1023, 1026-1028 (Fed. Cir. 1992); *Coastal Corp.* v.

United States, 713 F.2d 728, 730 (Fed. Cir. 1983). As just shown, petitioner's contractual debt to HUD is not within the purview of the Act. The court of appeals' conclusion that it lacked jurisdiction to hear petitioner's appeal was therefore correct. Petitioner cites no case that suggests the contrary.

2. The court of appeals also correctly denied petitioner's motion to transfer his appeal to a district court. Under 28 U.S.C. 1631, if a court of appeals concludes that it lacks jurisdiction over an appeal,

> the court shall, if it is in the interest of justice, transfer such * * * appeal to any other such court in which the action or appeal could have been brought at the time it was filed or noticed * * *.

In this case, as the court of appeals observed (Pet. App. 20a), petitioner simply failed to demonstrate why it was in the interest of justice to transfer the case. For whatever reason, petitioner selected a wrong forum in which to seek relief. Perhaps if he had demonstrated that an appeal to another court would have been proper and that such an appeal would now be out of time, a transfer to that court would have been appropriate. But petitioner made no such showing to the court of appeals, and he makes no such showing now to this Court. Indeed, petitioner fails to mention that he has an action for review pending in the United States District Court for the Southern District of Texas.

While petitioner suggests that the court of appeals ruled that he had no right to seek review of the decision of the HUDBCA in any court (Pet. 3-4), that is not what the court of appeals held. The court of appeals merely held that it had no jurisdiction and that it would not transfer the case to a district court because petitioner made an insufficient showing under Section 1631. The court of appeals did not decide whether any other court

would have jurisdiction over petitioner's claim, for it was not called upon to decide that question. Whether the United States District Court for the Southern District of Texas has jurisdiction over petitioner's claim is an issue for that court to decide in the first instance.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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